

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL ENRIQUE GALVEZ,

Defendant and Appellant.

B232312

(Los Angeles County
Super. Ct. No. KA092736)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tia G. Fisher, Judge. Affirmed as modified.

Michael Allen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven E. Mercer and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

Daniel E. Galvez appeals his conviction for one count of first degree burglary (Pen. Code, § 459)¹ and one count of assault with a deadly weapon (Pen. Code, § 245, subd. (a)) arising out of an altercation with his half brother, whom defendant attacked after forcibly entering a separate bedroom at his mother's home. Defendant argues the trial court erred in failing to stay his sentence on the assault count pursuant to section 654 because the burglary and assault were part of a single intent and objective. We agree, and modify the judgment to stay his sentence on count 1. In all other respects, we affirm the judgment.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In December 2010, Ana Maria Lizarraga was living with her husband, Hector Hugo Alarcon (Hector, Sr.), who is defendant's stepfather, and two of her sons, 17-year-old Hector Leonardo Alarcon (Hector, Jr.) and defendant. Lizarraga and her husband slept in one bedroom, and Hector, Jr. slept in another. Defendant, who had been staying with his mother since September 2010, slept in the living room on a folding bed.

Late in the evening on December 6, 2010, at approximately 11:30 p.m., Lizarraga had gone to bed. Hector, Jr. was in his bedroom but was not yet asleep. Defendant was asleep in the living room. Lizarraga got up to check on some laundry in the washing machine, which was located in a small room next to the living room, but discovered it had been turned off. Lizarraga remarked to her husband, who had followed her into the living room, that she was annoyed the machine had been turned off.

Defendant told Lizarraga he had turned the machine off, and complained to his mother that she was always washing clothes at night. Defendant, who had drunk a few beers and was "bothered," told Lizarraga to wash during the day because she did not work, and that she "didn't let anybody sleep." Lizarraga and her husband went back to their bedroom, but defendant kept saying "you don't work. You don't do anything. Why

¹ All further statutory references are to the Penal Code unless otherwise indicated.

don't you wash during the day." Hector, Jr. heard defendant calling Lizarraga names, so Hector, Jr. went into the living room.

Defendant saw Hector, Jr. standing in the door to the living room and asked him what he was looking at. Hector, Jr. responded, "calm down, or do you want to sleep outside." Defendant told Hector, Jr. to "take me out if you can." Hector, Jr. hit defendant in the eye.

Lizarraga tried to calm them down, and pushed Hector, Jr. back into her bedroom so that defendant and Hector, Jr. would not fight. Defendant and Hector, Jr. yelled at each other and called each other names. Defendant told Hector, Jr. to get a job and move out. After pushing Hector, Jr. into her bedroom, Lizarraga closed and locked the door, but defendant and Hector, Jr. kept yelling at each other through the closed door.

Lizarraga realized that defendant was stabbing at the closed door with a blade because she saw the blade go through the door two or three times. The door was like "cardboard," and defendant was making holes in the door. Defendant attempted to stick his hand through one of the holes near the doorknob, but it was not big enough. Defendant attempted to make the hole in the door bigger, and Hector, Jr. hit defendant's hand. Hector, Jr. leaned on the door in an attempt to keep it closed, and Hector, Sr., who was in the bedroom, picked up a laundry container and hit defendant. Lizarraga opened the window and yelled for help. When she turned around, the door had been knocked down. The door lock had broken off the door. Hector, Sr. took the knife away from defendant. Lizarraga saw that defendant was on the ground, and Hector, Jr. was on top of defendant holding defendant by the neck. Hector, Sr. was bleeding from a cut on his hand and Hector, Jr. were bleeding from a knife wound on his chest.

When police arrived, Hector, Jr. and Hector, Sr. were holding defendant down. Parts of the broken bedroom door were inside the bedroom. Defendant had an injured left eye and a bump on his forehead. Defendant did not complain about any injury to his mouth. Lizarraga told police that defendant had anger problems, and Hector, Sr. stated that he preferred the matter be handled as a family problem.

Defendant testified on his own behalf at trial that at the time of the altercation with Hector, Sr., he had a job working at an auto body shop in West Covina. He was on disability from his employment because he had fallen, and as a result he was unable to lift heavy objects and had problems with his shoulder and back. On December 6, 2010, Lizarraga asked him for more money for rent, but defendant refused to give it to her. He told her the next day he was going to move out. The day before at dinnertime he explained to his mother that he was not in any condition to pay more rent, he was studying and preparing for graduation in January 2011. Hector, Jr. ordered defendant to pay more rent, and threatened to break defendant's nose as he had done before and that he would throw defendant's belongings out of the house. Defendant went to sleep, and woke up with a tooth in his mouth. He spat the tooth into his hand and went to Lizarraga to show her what Hector, Jr. had done. At that point, Hector, Sr. and Hector, Jr. began to hit defendant.

Defendant denied breaking down the door to Lizarraga's bedroom. Instead, he claimed the door had been broken when Hector, Sr. and Hector, Jr. were hitting him and he fell against it. Defendant denied using a knife and stabbing Hector, Sr. or Hector, Jr.

In rebuttal, police testified that when they arrived on the scene, defendant had told them he was angry that Lizarraga was running the washing machine. Defendant did not mention the rent.

Defendant was charged by information with two counts of assault with a deadly weapon (§ 245, subd. (a)(1)) and one count of first degree burglary based upon his entry into Lizarraga's bedroom with intent to commit an assault (§ 459). The jury found defendant guilty on count 1 (assault of Hector, Jr.), not guilty on count 2 (assault of Hector, Sr.) and guilty on count 3 (burglary of Lizarraga's bedroom).

At the sentencing hearing, the court acknowledged the section 654 implications and stated, "while technically one could argue that [section] 654 doesn't apply, . . . there would be a legal argument that it could apply . . . [because] it's part and parcel of the same transaction and occurrence." However, the court sentenced defendant to the

midterm of four-years on the burglary count and elected to impose a three-year concurrent sentence on the assault with a deadly weapon count.

DISCUSSION

Defendant contends his sentence on count 1 (assault of Hector, Jr.) violated section 654 because the assault and burglary were part of a single objective, and asserts that in its closing argument to the jury, the prosecution argued defendant committed the burglary for the purpose of entering his mother's bedroom to assault Hector, Jr. The People concede that defendant is correct.² We agree.

Penal Code section 654 prohibits punishment for two crimes arising from a single indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) If all of the crimes were merely incidental to, or were the means of accomplishing or facilitating one objective, a defendant may be punished only once. (*Ibid.*) If, however, a defendant had several independent criminal objectives, he may be punished for each crime committed in pursuit of each objective, even though the crimes shared common acts or were parts of an otherwise indivisible course of conduct. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) "The defendant's intent and objective are factual questions for the trial court, and we will uphold its ruling on these matters if it is supported by substantial evidence. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.)" (*People v. Perry* (2007) 154 Cal.App.4th 1521, 1525.)

² We requested the parties to file letter briefs on the issue of whether defendant could be separately convicted of burglarizing his mother's bedroom apart from the assault count because defendant had a possessory interest in the house. (See *People v. Gauze* (1975) 15 Cal.3d 709, 715.) After considering the brief filed by respondent (defendant did not file a letter brief), we conclude that a separate conviction on the burglary count here is proper. (See *People v. Abilez* (2007) 41 Cal.4th 472, 509.) Upholding a conviction for burglary of a room in a house in which defendant resided, the court held in *Abilez*, "The jury could have concluded that, under the circumstances, defendant at that time lacked the victim's consent to enter her bedroom; that he may have had a possessory right to enter the home does not preclude a conviction for burglary on these facts." (*Ibid.*)

Where the commission of one crime is “‘a means toward the objective of the commission of the other,’” defendant may not be punished separately for both offenses. (*People v. Britt* (2004) 32 Cal.4th 944, 953.) Here, defendant engaged in fisticuffs with Hector, Jr. in the living room, and after his mother took Hector, Jr. to her bedroom to break up the fight, defendant pulled out a knife and broke down the door—thereby committing burglary—in order to continue his attack on Hector, Jr. Defendant’s burglary of his mother’s bedroom was therefore solely committed to facilitate the continued assault of Hector, Jr. We find the court erred in failing to stay the sentence on count 1 pursuant to section 654.

DISPOSITION

Defendant’s sentence on count 1 is stayed. In all other respects, the judgment is affirmed. The trial court is ordered to prepare a new abstract of judgment reflecting these changes and to forward it to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, Acting P. J.

CHANEY, J.